In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-809

EDWARD TAYLOR HINMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the federal co-conspirator exception to the hearsay rule was unconstitutionally applied in this case because it denied the right of confrontation, and (2) that the evidence was insufficient to support his conviction.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to possess and distribute heroin, in violation of 21 U.S.C. 846.[1] He was sentenced to a term of imprisonment of one year and one day, to be followed by a five-year special parole term. The court of appeals affirmed without opinion (Pet. App. A).

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[1]Prior to petitioner's trial, co-defendants Frank Seaman and Daniel Homen each pleaded guilty to one count of conspiracy.

1. On October 30, 1972, Joseph Salvemini, a Special Agent of the Drug Enforcement Administration (DEA) working in an undercover capacity, met with petitioner at a diner in Manhattan to discuss the purchase of a large quantity of narcotics (Tr. 38). Petitioner told Agent Salvemini that he could sell him a kilogram of heroin that he would obtain from friends who were accumulating large quantities of drugs in the San Antonio-Austin, Texas area (Tr. 38-39). Petitioner suggested, however, that they first conduct a few small drug transactions until they got to know each other better. Agent Salvemini agreed and told petitioner he would like a sample of the heroin and cocaine that petitioner was selling (Tr. 39). This arrangement was acceptable to petitioner, who thereupon gave Agent Salvemini a small package containing heroin and cocaine (Tr. 28, 40). Petitioner stated that this sample was respresentative of the quality of the narcotic drugs that his sources in San Antonio could supply (Tr. 40). Agent Salvemini told petitioner he would get in touch with him concerning narcotics purchases if the sample met with his satisfaction (Tr. 42).

Approximately two weeks after the meeting at the diner, Agent Salvemini called petitioner at a telephone number in Alexandria, Virginia (Tr. 44-46). On that occasion, petitioner told Salvemini that he could bring a large quantity of heroin to New York on relatively short notice (Tr. 47). Later that night, Agent Salvemini again spoke with petitioner about purchasing narcotics (Tr. 47).

One week later, Agent Salvemini again spoke with petitioner, who stated that he was having some difculty in getting his source in San Antonio to bring the heroin to New York. Petitioner suggested that

Agent Salvemini come to Washington, D.C., to meet with the people from San Antonio, but Agent Salvemini declined to do so (Tr. 48).

On December 7, 1972, Agent Salvemini met in Manhattan with one of petitioner's co-defendants, Frank Seaman (Tr. 49). Seaman told Agent Salvemini that he had brought a pound of heroin to Washington from San Antonio, and that the heroin had been diluted to two pounds (Tr. 51-52); one pound had been sold and the other pound was in petitioner's possession (Tr. 52). Agent Salvemini told Seaman that he was unhappy with the sample he had gotten from petitioner (Tr. 52). Seaman responded that the heroin he could supply was twice as good as the sample sent through petitioner (Tr. 52). After Agent Salvemini showed Seaman $15,000, they agreed on the purchase of a quarter of a kilogram of heroin for $6,500 (Tr. 53). Seaman told Agent Salvemini that he, not petitioner, would be delivering this package (Tr. 53-54).

On December 12, 1972, Seaman and co-defendant Daniel Homen sold Agent Salvemini a quarter of a kilogram of heroin at Laguardia Airport in New York (Tr. 55-56). Seaman and Homen were immediately arrested (Tr. 65).

2. The doctrine that declarations of one conspirator may be introduced in evidence against another, if the declarations are made during the course of and in furtherance of the conspiracy, has long been recognized by this Court as an exception to the hearsay rule in federal conspiracy trials. *Anderson* v. *United States,* 417 U.S. 211, 218-219; *Dutton* v. *Evans,* 400 U.S. 74, 80-81; *Lutwak* v. *United States,* 344 U.S. 604, 617; *Krulewitch* v. *United States,* 336 U.S. 440. See also Fed. R. Evid.

801(d)(2)(E). Moreover, in 1970 this Court specifically rejected the argument made here that the Sixth Amendment's confrontation clause limits this hearsay exception. See *Dutton* v. *Evans, supra,* 400 U.S. at 82. There is no need now to re-examine the constitutionality of this established doctrine.

In the circumstances of this case, it was quite proper to admit the statements made by co-conspirator Seaman to Agent Salvemini. Petitioner's role as a co-conspirator was established through his own statements and acts. Thus, the requirement of *United States* v. *Geaney,* 417 F.2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States,* 397 U.S. 1028, that there be evidence of petitioner's participation in the conspiracy independent of the hearsay, was more than satisfied. Accordingly, statements of co-conspirator Seamen, which were made during the course of and in furtherance of the conspiracy, were properly admitted.[2]

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[2]Petitioner argues (Pet. 5-6) that reliability should be a criterion for the admissibility of hearsay evidence under the co-conspirator exception to the hearsay rule. While he correctly points out that reliability or trustworthiness is a characteristic common to many exceptions to the hearsay rule (see, *e.g., Chambers* v. *Mississippi,* 410 U.S. 284, 298-299), it has never been thought to be an essential requisite for admissibility under the co-conspirator hearsay exception. Indeed, as the Advisory Committee on the new Federal Rules of Evidence pointed out in its discussion of admissions by a party opponent, including statements by a co-conspirator, "No guarantee of trustworthiness is required in the case of an admission." 56 F.R.D. at 297. In any event, Seamen's statements here were reliable; they were consistent both with his acts and with petitioner's statements and acts.

Petitioner's contention (Pet. 9-11) that the evidence against him was insufficient to support his conviction as a matter of law is answered by the evidence introduced at trial, which we have summarized. These facts clearly demonstrate the existence of the narcotics conspiracy and petitioner's participation therein.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.